NVJ MENON

v.

THE GREAT EASTERN LIFE ASSURANCE COMPANY LTD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ALAUDDIN MOHD SHERIFF JCA
RICHARD MALANJUM JCA
[CIVIL APPEAL NO: W-02-781-1996]
8 OCTOBER 2002

CONTRACT: *Construction - Agreement to appoint insurance agent - Claim for commission for group scheme insurance policies - Inconsistency between main contract and circular issued by company - Whether agent entitled to overriding commission - Limitation - Whether claim time barred - Whether rule governing limitation replaced by contrary intention*

The plaintiff, a divisional sales officer ('DSO') of the defendant, had executed two agency agreements with the latter in 1986. By the agreements, the plaintiff undertook to canvass proposals for assurance on the lives of individuals and forward the same to the defendant in return for the payment of commission. The agreements however stipulated that the plaintiff was not entitled to any commission on sales of group scheme insurance policies. Apart from these, the defendant had also issued circulars to the plaintiff. And thus, by a circular issued in 1987, the defendant undertook to grant the plaintiff overriding commission in respect of the sales of group scheme insurance policies. The plaintiff, having successfully forwarded the proposal of one Indrani ('Indrani'), claimed from the defendant the full benefit thereof, including that of a group insurance policy secured by Indrani. The defendant refused to pay, whereupon the plaintiff, in 1993, filed an action in the High Court claiming the commission. The claim was dismissed by the learned judge ruling that it was time barred, and that the plaintiff, upon the proper construction of the agreements, was not entitled to benefit from the group scheme policy in question. The plaintiff appealed.

Held (allowing the appeal and reversing the High Court)
Per Gopal Sri Ram JCA delivering the oral judgment of the court:

[1] The agreements and the circular should be read together. Taken together, the agreements governed the dual relationship subsisting at the material time between the plaintiff and the defendant. The plaintiff was an agent and was governed in that relationship by certain terms and conditions, including that he was not entitled to receive overriding commission on the sales of group scheme insurance policies. However, that was not the case when the plaintiff and the defendant dealt with each other in the plaintiff's capacity as DSO. As was made clear by para. 11(A)(i) of the 1987 circular, the plaintiff was entitled to a 10% group scheme agent's commission. Read together, the agreements and the circular had created an entitlement in the plaintiff's favour of an overriding commission in respect of group scheme policies of insurance. (p 103 b-g)

[2] In the present case, the general rule governing limitation of actions was being replaced with a contrary intention evinced by the parties. It was the intention of the parties that the obligation to pay an overriding commission to the plaintiff was a continuous one. Such a continuous obligation therefore displaced the statutory limitation provision governing breach of contract. Accordingly, the plaintiff's cause of action arose at least in 1990 when the defendant informed him that it would not honour its continuing obligation. Alternatively, this was a contract to which no period of limitation applied for so long as the parties remained in contractual relationship *ie*, so far as the overriding commission on group scheme policies were concerned. The plaintiff's claim was therefore not time barred. (p 106 d-g)

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif, seorang Pegawai Bahagian Jualan defendan ('DSO'), telah memeterai dua perjanjian agensi dengan pihak terkemudian pada tahun 1986. Melalui perjanjian, plaintif akan berusaha mendapatkan cadangan-cadangan insurans nyawa bagi orang-orang perseorangan untuk dikemukakan kepada defendan dan sebagai balasan akan dibayar komisyen-komisyen tertentu. Perjanjian bagaimanapun memperuntukkan bahawa plaintif tidak berhak kepada sebarang komisyen bagi jualan-jualan polisi insurans skim kumpulan. Namun begitu, selain dari perjanjian, defendan juga ada mengeluarkan surat-surat pekeliling kepada plaintif. Dan, melalui satu surat pekeliling yang dikeluarkan pada tahun 1987, defendan bersetuju untuk membayar komisyen terkumpul kepada plaintif atas jualan polisi insurans skim kumpulan. Plaintif, setelah berjaya mengemukakan cadangan insurans nyawa seorang P.S nee Indrani ('Indrani') kepada defendan, menuntut dari defendan segala faedahnya, termasuk faedah

dari satu polisi insurans skim kumpulan yang diperolehi oleh Indrani. Defendan enggan membayar, berikutan mana plaintif, pada tahun 1993, telah memfail tindakan di Mahkamah Tinggi menuntut pembayaran komisyen. Tuntutan plaintif bagaimanapun telah ditolak oleh yang arif hakim yang memutuskan bahawa ia telah dihalang oleh had masa, dan bahawa plaintif, atas pentafsiran sebenar perjanjian, tidak berhak kepada faedah polisi skim kumpulan tersebut. Terkilan, plaintif merayu.

Diputuskan (membenarkan rayuan dan mengakas Mahkamah Tinggi)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman lisan mahkamah:

[1] Perjanjian dan surat pekeliling harus dibaca bersama. Membacanya secara bersama, perjanjian mengawalselia dua hubungan yang wujud pada waktu material di antara plaintif dan defendan. Plaintif adalah seorang agen dan dalam hubungan itu telah dikuasai oleh terma dan syarat, termasuk bahawa beliau tidak berhak untuk menerima komisyen terkumpul atas jualan-jualan polisi insurans skim kumpulan. Bagaimanapun, ini bukanlah kedudukannya apabila plaintif dan defendan berhubung sesama mereka dalam kapasiti plaintif sebagai DSO. Sepertimana yang terjelas dari perenggan 11A(i) surat pekeliling 1987, plaintif, dalam perhubungan sedemikian, adalah berhak kepada 10% komisyen agen skim kumpulan. Dibaca secara bersama, perjanjian dan surat pekeliling telah mencipta suatu keberhakan kepada plaintif untuk mendapat komisyen terkumpul berkaitan polisi insurans skim kumpulan.

[2] Dalam kes semasa, kaedah am yang menguasai tindakan-tindakan had masa telah diganti oleh niat sebaliknya yang ditunjukkan oleh pihak-pihak. Adalah menjadi niat pihak-pihak bahawa obligasi untuk membayar komisyen terkumpul kepada plaintif adalah sesuatu yang berterusan. Obligasi berterusan tersebut, dengan itu, telah mengambilalih had-had statutori yang mengawali kes-kes kemungkiran kontrak. Ianya mengikut bahawa kausa tindakan plaintif telah berbangkit setidak-tidaknya pada tahun 1990 apabila defendan memberitahu hasrat mereka untuk tidak menunaikan obligasi yang berterusan itu. Secara alternatifnya, ini adalah suatu kontrak kepada mana tempoh had masa tidak terpakai selagi pihak-pihak berada pada kedudukan berkontraktual, iaitu, dalam kaitan dengan komisyen terkumpul polisi skim kumpulan. Tuntutan plaintif dengan itu adalah tidak dihalang oleh had masa.

Case(s) referred to:
Bahamas International Trust Co Ltd v. Threadgold [1974] 1 WLR 1514 ***(refd)***
Credit Corporation (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***
Lim Kean v. Choo Koon [1970] 1 MLJ 158 ***(refd)***
Loh Wai Lian v. SEA Housing Corp Sdn Bhd [1987] 2 MLJ 1 ***(refd)***
Nasri v. Mesah [1971] 1 MLJ 32 ***(refd)***
New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 MLJ 185 ***(refd)***
Reynolds v. PP [1956] MLJ 101 ***(refd)***
Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***
Weng Sin Meng v. Wong Sam Moi & Anor [1991] 2 MLJ 277 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6(1)(a)

For the appellant/plaintiff - P Gananathan (Anand Ponnudurai); M/s Logan Sabapathy & Co
For the respondent/defendant - Nallini Pathmanathan; M/s Skrine

[Appeal from High Court, Kuala Lumpur; Suit No: D3-22-348-1993]

Reported by Izatty Izzudin

JUDGMENT
(Oral)

Gopal Sri Ram JCA:
This is the judgment of the court.

This appeal is directed against the order of the learned judge of the High Court, dismissing the plaintiff's claim for the following relief:

(a) a declaration that he is entitled to full benefit of all business transacted by P.S. nee Indrani – Account no. 042412 Org. No. 6200;

(b) an order that an account be taken in respect of Indrani's business transaction;

(c) judgment for such sums as shown in the account with interest thereon

(d) alternatively for damages and interests thereon; and

(e) costs.

The facts which form the background against which this appeal rests, fall within a narrow compass. The plaintiff (the appellant before us) was at all material times a Divisional Sales Officer ("DSO") of the defendant (the respondent before us). But he had another relationship with the defendants, namely as agent for the sale of the defendant's insurance policies.

These two relationships are contained in two separate agreements. These agreements were entered into between the plaintiff and the defendant periodically. The agreements material and relevant to the instant dispute are both dated 8 July 1986. Both had several clauses. Many of them are relevant for present purposes. But, so far as the present appeal is concerned, it is sufficient that we reproduce four clauses, first from the Agency Agreement. These are cls. 1, 5, 18 and 29.

They read as follows:

> 1. The Company hereby appoints the Agent under Agency Account No. 006629-0 for the purpose of canvassing proposals for assurance on the lives of individuals and forwarding such proposals to the Company.
>
> 5. The Agent's remuneration shall be by way of commission payable in Ringgit only at the rate and subject to the terms specified in the Schedule of Commission, attached to and forming a part hereof (hereinafter referred to as the 'Schedule') for his agency services hereunder. Such commission shall only be payable on cash premiums actually charged and received by the Company during the currency of this Agreement on policies of assurance effected on proposals canvassed and forwarded to the Company by the Agent.
>
> 18. It is hereby agreed (i) that the Company is at liberty to issue circulars and directives from time to time relating to the operation of the agency established hereunder and (ii) that the Agent shall observe such circulars and directives as if they were part of this Agreement when distributed.
>
> 29. It is hereby agreed (i) that in addition to this Agency Agreement the parties may execute a further agreement (hereinafter referred to as the 'Supplementary Agreement') relating to the designation held by the Agent as a life assurance sales representative and (ii) that should this Agreement be terminated for any reason whatsoever the Supplementary Agreement if any shall also automatically be terminated.

There is a schedule attached to the Agency Agreement which sets out the commission which the plaintiff is entitled to receive as an agent. Nothing turns on this as the present claim is not in respect of commissions due to the plaintiff in his capacity as agent.

We now turn to the Supplementary Agreement which, as we have said, is also dated 8 July 1986. Again we will only reproduce the following clauses which we consider to be relevant to the appeal. They are cls. 5, 6 and 15 as follows:

5. Subject to Clause 17 hereof, remuneration of the DSO shall be by way of commission as specified in the attached Schedule of Remuneration (hereinafter referred to as 'the Schedule') which Schedule shall form part of this Supplementary Agreement.

6. The DSO's division shall achieve an Annual First Year Life Premium Income Quota (hereinafter referred to as the Annual Quota) of $75,000/- of which a minimum of $30,000/- (hereinafter referred to as the Direct Quota) must be secured by the DSO and his direct agents. The Annual Quota and the minimum Direct Quota may be varied by the Company at its sole and absolute discretion. If the DSO fails to achieve the Annual Quota for two successive years or two out of three years, this Supplementary Agreement shall be automatically terminated. The term, 'First Year Life Premium Income' shall include 50% of the First Year Premium Income for term rider, reducing term rider and term policy provided the premium paying period for these assurances are 5 years or more, but shall exclude all extra premiums, accident premiums, hospital premiums, mortgage decreasing policy, single premium, pure endowment, personal accident, educational annuities, child's special endowments or other similar policies and all types of annuities.

15. For the avoidance of any doubt it is hereby agreed between the parties that this Supplementary Agreement is to be read together with the Principal Agreement and as provided in Clause 29 of the Principal Agreement. Should the Principal Agreement be terminated for whatever reason this Supplementary Agreement shall also automatically be terminated.

It is common ground between the parties that the plaintiff recruited and trained one Indrani to be the defendant's agent. This Indrani secured a group policy insurance for a trade union in the year 1986. The plaintiff got to know about this in 1986 itself when Indrani's husband approached the plaintiff for a recommendation to purchase an insurance policy. The plaintiff then wrote to the defendant asking for his overriding commissions on the group policy brought in by Indrani. His view was he was entitled to that commission. So he wrote for it. There was some correspondence over this between the plaintiff and the defendant. Eventually in 1990 the defendant made it absolutely clear in its letter to the plaintiff that he was not entitled to any commissions for group scheme policies.

The plaintiff issued his writ in 1993. In a comprehensive defence, the defendant joined issue on two main points in the plaintiff's claim. First, it pleaded that the plaintiff was not entitled to the commission he claimed because it was not an admissible payment on a proper construction of the whole of the Agreement that subsisted at the material time between the parties. Second, it was pleaded that the plaintiff's claim was barred by limitation.

The action came up for hearing on 13 September 1996. *Viva voce* evidence was led. At the conclusion of evidence and submission the learned judge dismissed the plaintiff's claim. He did so on three grounds. First, that the plaintiff's claim was barred by limitation. Second, that the plaintiff was not entitled to benefit from the group scheme policy secured by Indrani. Thirdly, because he had not assisted Indrani as required by his contract and was therefore not entitled to receive any commissions.

By reason of the way in which the appeal has been argued before us this morning, we find it convenient to deal first with the second ground relied upon by the learned judge for dismissing the plaintiff's claim.

Was There An Entitlement To Receive Commission?

It is the defendant's case both here and in the court below that for the purposes of determining the plaintiff's entitlement, the agreement between the parties comprises of the Agency Agreement dated 8 July 1986, the Supplementary Agreement also dated 8 July 1986 and the relevant circulars issued by the defendant. These according to learned counsel for the defendant should be read together as a single document. When this is done, learned counsel submits, it will be found that the plaintiff is not entitled to receive any commission from the sale of group scheme insurance policies secured for the defendant by the plaintiff's subordinates. According to the defendant, all that the plaintiff is entitled to receive by way of overriding commission is from the sales of individual life insurance policies by those subordinate to him. Now, to appreciate this point in its context one has to have regard to cl. 6 of the Supplementary Agreement which we have reproduced earlier in this judgment. The plaintiff has argued that there is nothing in the said clause which deprives him of his overriding commission under the Supplementary Agreement, simply because that clause in its exclusionary section does not refer to group scheme policies. By contradistinction the Agency Agreement in its schedule makes such an exclusion in para. (h) thereof which reads as follows:

> (h) The term 'First Year Life Premium Income' as used herein shall mean First Year Life Premiums on Policy Plans A and B and 50% on term rider, reducing term rider and term policy provided the premium paying period for these assurances are 5 years or more excluding all premiums in respect of extra rating, accident benefit, hospital benefit, single premium policy, mortgage decreasing policy, group schemes, personal accident, all classes of annuity, pure endowment and any other type of related plan or contract taken singly or in conjunction with a basic life assurance policy.

Ms. Nallini Pathmanathan answers this point with the response that the two agreements, namely the Agency Agreement and Supplementary Agreement, should be read together and when this is done, the exclusion of group scheme insurance policies found in the Agency Agreement will be incorporated into the Supplementary Agreement. In consequence the plaintiff has no claim.

We are in agreement with the submission of Ms. Pathmanathan that these two agreements should be read together. That is what each agreement says. But where we find ourselves in dissent with learned counsel is as to the consequence of them being read together. In our judgment, both agreements have to be read as a whole to comprehend their meaning, purport as well as their aim and object.

When this is done, it is clear that taken together these agreements govern the dual relationship subsisting at the material time between the plaintiff and the defendant. On the other hand, the plaintiff was an agent. He was governed in that relationship by certain terms and conditions. One of the conditions was that as an agent, he was not entitled to receive overriding commissions on the sale of group scheme insurance policies. However, that was not the case when the plaintiff and the defendant dealt with each other in the plaintiff's capacity as DSO. This is made amply clear in para. II (A)(i) of the circular issued by the defendant in 1987, which provides for his overriding commissions of 10% Group Scheme Agent's commission. As we have said earlier, it is common ground that this circular forms part of the terms and conditions of the plaintiff's contract.

Thus when read together, the Agency Agreement, the Supplementary Agreement and the circulars sufficiently create an entitlement in the plaintiff's favour of an overriding commission in respect of Group Scheme policies of insurance. It would be noticed that we have in arriving at our aforesaid conclusion made no reference to the oral evidence led at the trial as to the meaning and interpretation of the contract between the parties. This is because the construction of a contract is a question of law for determination by the court and not by witnesses through their oral evidence.

As Lord Diplock observed in *Bahamas International Trust Co Ltd v. Threadgold* [1974] 1 WLR 1514:

> In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court before which the concession is made; a *fortiori* in the court to which an appeal from the judgment of the court is brought. The reason is that the construction

> of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.

When it comes to the meaning of words, it does not matter whether they appear in a contract or written law, the result is the same. The point is illustrated by the judgment of Thompson J, (as he then was) in *Reynolds v. Public Prosecutor* [1956] MLJ 101, 103:

> It may be that the learned President accepted the evidence of the various functionaries of the Police Department who gave evidence as to what they considered to be the meaning of the relevant Orders as conclusive. If so, I think he was wrong. Whatever may be the attitude of Government functionaries who have to deal with these Financial General Orders there is nothing sacrosanct about them. They were not brought down from Pisgah by any bureaucratic Moses. They are written words and like any other written words what they mean is a matter of construction. It is no concern of mine as a Judge what civil servants do among themselves. As far as a Judge is concerned, they can say that black is white and for the purposes of their own activities black is white. But when the criminal law and its sanctions are invoked and any question of construction is involved then that is a question for the Court to decide and not any Financial Assistant or even any Superintendent of Police who happens to be in charge of records.

So too here. It matters not a jot to us what the plaintiff thought his entitlements under the contract with the defendant were. Neither does it matter to us what the defendant's witnesses thought of the way in which that contract ought to be interpreted. Their views are entirely irrelevant; as irrelevant as the views of the witnesses who gave their interpretation of the Financial Orders in Reynolds.

In the instant case, the learned judge referred to the oral testimony and relied upon it for the interpretation of the agreements and circulars. That, in our view is clearly an inadmissible method of construction. In any event we find ourselves unable to agree with the learned judge's conclusion that the plaintiff was not, on a true construction on the contract in question, entitled to the overriding commissions he sought. We would therefore respectfully differ from the learned judge and resolve the first issue in the plaintiff's favour. In other words we agree that the plaintiff is entitled to receive an overriding commission in respect of group scheme insurance policies sold by those subordinate to him.

Limitation

The next ground we will consider is the limitation point. Here the learned judge found that the plaintiff's cause of action had arisen in 1984, and that his claim for the period from 1984 to 9 April 1987 was barred by s. 6(1)(a) of the Limitation Act 1953.

In arriving at this conclusion, this is what the learned judge said:

> In the instant case the plaintiff's claim is founded on an alleged breach of contract. There is no question that the Plaintiff's right was infringed or any threat to infringe that right. It is simply and purely a question of a breach of contract. On the evidence it is clear that the plaintiff is claiming the overriding commission he alleged he was entitled to on group scheme production of Indrani for the period commencing from 1986. The Plaintiff filed his claim on 8th April 1993. In order to succeed in his claim the Plaintiff has to prove that Indrani's earnings on group scheme before 8th April 1987, that the Plaintiff was entitled to be paid a commission on Indrani's such earnings and the plaintiff had breached the agency agreement and the supplementary agreement. These facts which are material to be proved to entitle the Plaintiff to succeed have happened before 8th April, 1987. There was in existence a person who can sue and another who can be sued.

In support of this conclusion, he relied on well known authorities upon the subject: *Lim Kean v. Choo Koon* [1970] 1 MLJ 158; *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69, *Weng Sin Meng v. Wong Sam Moi & Another* [1991] 2 MLJ 277, *Nasri v. Mesah* [1971] 1 MLJ 32.

Now, it is not in doubt that the foregoing cases are authority for the general proposition that in an action for breach of contract time begins to run against a plaintiff from the date on which the defendant breached his obligations. But as all general rules, this too, has its qualifications.

For the purposes of the present instant one qualification requires consideration. It is open to parties to a contract to regulate or modify their rights in the event of a breach in any way that they think fit. They may extend the period of the accrual of the cause of action although not its abridgement. (See, *New Zealand Insurance Co Ltd v. Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185, for the abridgement of the limitation period). In such event, the accrual of any cause of action is a question of interpretation of the terms of a particular contract. We find support for this view in the judgment of Lord Oliver of Aylmerton in *Loh Wai Lian v. SEA Housing Corp. Sdn Bhd* [1987] 2 MLJ 1 at pp. 3-4, which was quoted and applied by this court in *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26:

> The use of the word 'indemnity' is significant, for in its natural meaning it imports the notion of compensation for a loss already suffered when the compensation is paid (see, for instance, *Yokshire Electricity Board v. British Telecom* [1986] 1 WLR 1029 at p. 1034) ...
>
> … But parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction of what they have provided. This appeal raises no point of principle but simply a question of what is the true construction of the contract in which the parties entered. In their Lordships' judgment, the only sensible construction of cl. 17 is, as Mr. Kidwell has contended, that it imposes an obligation to pay, in substitution for any other right to damages which the purchaser might otherwise have, a single sum to be calculated and ascertained at a particular date and that until that sum has been ascertained it does not become due and cannot be sued for. (emphasis added.)

In the present case we find the general rule governing limitation of actions to have been displaced by a contrary intention evinced by the parties in this case. It was the intention of the parties here, we find, that the obligation to pay an overriding commission to the plaintiff to be a continuous one. Put another way, there was an obligation upon the defendant to continuously pay overriding commissions to the plaintiff as and when they fell due. When that obligation was breached, its consequences flowed continuously and not from time to time. Such a continuous obligation as is found here therefore displaces the statutory limitation provision governing breach of contract. Accordingly, the plaintiff's cause of action arose at least in 1990 when the defendant informed him that it would not honour its continuing obligation. Alternatively, on a true construction of the Agreement, this is a contract to which no period of limitation applies for so long as the parties remain in contractual relationship ie, so far as the overriding commissions on group scheme policies are concerned. We express no view as to the limitation period for breaches of other terms of the contract. We emphasize that we confine our findings and our views to the obligations to pay the aforesaid overriding commissions.

For these reasons, we are unable to agree with the learned judge that the plaintiff's claim was barred by limitation. We must hasten to add in fairness to Ms. Nallini Pathmanathan who appeared both here and in the court below that she did not put the limitation point at the forefront of her case at both levels. It would appear that the learned judge gave precedence to this issue.

Assistance To The Agent Required?

That brings us to the third ground relied upon by the learned judge. It has to do with the plaintiff's failure to assist Indrani in respect of group schemes policy of insurance she had procured.

This, the learned judge found to be a breach of para. 7(ii) of defendant's circular No. 2/1987 which reads as follows:

> 7. (ii) If the Group Scheme Agent and/or his field officers are not servicing the Scheme or are not recognised by the group policyholder or the Company, then no payment such as commission, production allowance or overriders is payable to him or to any of his senior field officers.

It is the argument of learned counsel for the defendant that the plaintiff has himself to blame for the loss of any commission by reason of his failure to supervise Indrani. It is a matter upon which, counsel says, her client has no control. However, on scrutinising the circular with a critical eye, we find that para. 7(ii) does not apply to the plaintiff. This is because para. 6 of the same circular defines a Group Scheme agent as "the agent or field officer of Great Eastern Life who secures the Scheme and services the Scheme and is so recognised by the group policyholder and the Company."

Thus in reality para. 7(ii) applies to Indrani and persons in her status with the defendant and not to the plaintiff. Accordingly we are unable to agree with the learned judge that there was misconduct on the part of the plaintiff disentitling him to the commission in question.

For the reasons given we would also resolve the second and third issues in the plaintiff's favour and against the defendant.

To sum up, the plaintiff has, in our judgment, established his case. He is therefore entitled to the declaration and other relief sought by him in his statement of claim. Consequently we would reverse the findings of the learned judge and enter judgment for the plaintiff. The plaintiff will have his declarations. He will also have an order for an account to be delivered by the defendant. The defendant must pay the costs of this appeal and those incurred in the court below all of which will be taxed by a proper officer of the court. The plaintiff will also have liberty to apply by way of summons to proceed under this judgment which will of course have to be made before the High Court.